



August 28, 2019

Submitted via FOIAonline

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2822T)
Washington, D.C. 20460

Re: Freedom of Information Act Request and Request for Fee Waiver

Dear Freedom of Information Officer,

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and U.S. Environmental Protection Agency (“EPA”) regulations, 40 C.F.R. § 2, WildEarth Guardians (“Guardians”) hereby requests the following records from EPA:

Any and all records of discussions between EPA and Colorado state officials and/or state employees regarding the “bump up” of the Denver Metro–North Front Range Ozone Nonattainment area for the 2008 ozone standards from moderate to serious nonattainment.

For purposes of this request, records include, but are not limited to: communication records (including, but not limited to, recorded voicemails, text messages, chat messages, e-mails, and printed letters), memoranda, facsimiles, reports, analyses, meeting notes, records of conversations, meeting sign-in sheets, images, video, and audio. We request all responsive records on file with EPA, including both records created and obtained by EPA, regardless of the means by which they were obtained, whether draft or final. We would prefer to receive all responsive records in a digital format, preferably on a flash drive, that is readable using computer software commonly available to the public. We do not request any records that are already publicly available online on an EPA website that is not subject to alteration or elimination, whether temporarily or permanently. We request records received, created, and/or transmitted up until EPA makes a final search for this FOIA request.

Request for Fee Waiver

Guardians requests that you waive all fees in connection with this matter. A fee waiver is justified because Guardians meets the test under FOIA for a fee waiver as specified by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2).

I. Disclosure of this Information is in the Public Interest Because It Will Significantly Contribute to Public Understanding of the Operations or Activities of Government.

To start, disclosure of the requested information is in the public interest because it will significantly contribute to public understanding of the operations and activities of the EPA.

FOIA carries a presumption of disclosure. The fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as Guardians access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that “the amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’ The amendment’s main purpose was ‘to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.’ ” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by watchdog organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the D.C. Circuit Court of Appeals has stated “the waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.” *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

A. The subject of the request concerns “the operations and activities of the government.”

Because this is a request for documents from an executive branch agency—EPA—this request concerns the operations and activities of government. Specifically, the requested information concerns to the agency’s actions preparing for the inevitable “bump up” of the nonattainment status of the Denver Metro–North Front Range 8-hour Ozone Non-Attainment Area, an area of particular importance for Guardians.

B. The disclosure is “likely to contribute” to a public understanding of government operations or activities (the informative value of the information to be disclosed and ability to disseminate).

The information requested will help provide crucial insight into the EPA discussions and preparations to take action to protect the Denver Metro–North Front Range 8-hour Ozone Non-Attainment Area from further degradation. This context will provide the public with a more complete understanding of EPA’s future actions.

Guardians has specifically and consistently demonstrated its ability to disseminate information relative to the operations of EPA. We accomplish information dissemination through printed media (both paid media and earned media), our email list, list-serves to which we post, printed publications we write and distribute via mail and the internet, articles and essays for other public interest organizations, and public meetings held or sponsored by us, other nonprofit public interest entities, or federal agencies.

Guardians is a non-profit organization that informs, educates, and empowers the public regarding environmental issues, policies, and laws. We have been involved in scrutinizing EPA actions for many years. For example, within the past year, we’ve commented on draft air permits for oil and gas operations in Utah issued by the EPA and an EPA proposal to grant an extension request from the state of Colorado to come into compliance with 2008 ozone standards.

Our organization plays an active role in informing the American public about EPA’s actions on air quality. We are regularly interviewed and quoted by the news media with regards to federal environmental decisions.¹ With the requested information, we intend to continue to inform, educate, and empower the public regarding this particular issue. We have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers. News articles have featured Guardians and the information it has gathered under FOIA, particularly in relation to issues related to federal oil and gas management.²

We also independently disseminate information obtained under FOIA through our own public outreach, including through blog posts, mapping projects, social media, and other sources. Some recent examples of disseminating information obtained from EPA’s sister agency—BLM—under FOIA include: sharing information obtained under FOIA regarding oil and gas leases in Nevada through an interactive online map, https://arcgis.com/arcgis/rest/services/BLM/NV_Oil_Gas_Leases/MapServer and sharing information obtained under FOIA regarding oil and gas pipelines in New Mexico through another interactive online map, https://arcgis.com/arcgis/rest/services/BLM/NM_Oil_Gas_Pipelines/MapServer.

In granting a fee waiver to Guardians, it is important to recognize that (1) the requested information will contribute significantly to the public understanding of the operations or activities of the government, (2) the requested information will enhance the public’s

¹ See, e.g., Alan Neuhauser, Interior, Planning to Expand Drilling Despite Shutdown, Urged to Halt Oil and Gas Leases, U.S. News & World Report, Jan. 17, 2019, <https://www.usnews.com/news/national-news/articles/2019-01-17/interior-planning-to-expand-drilling-despite-shutdown-urged-to-halt-oil-and-gas-leases>.

² See, e.g., Pamela King, *What Will 2018 Hold?* E&E News, Jan. 2, 2019, <https://www.eenews.net/stories/1060069839>.

understanding to a greater degree than currently exists, (3) Guardians possesses the expertise to explain the requested information to the public, (4) Guardians possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that Guardians is an established expert in the field of air quality issues.

Guardians staff and contractors responsible for interpreting, compiling and presenting this information to the public in an understandable manner possess the requisite experience, intelligence and expertise to carry out this task. Guardians has consistently proven its ability to gather and disseminate information obtained from EPA and other agencies.

C. The disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807 (2d. Cir. 1994).

Guardians’ track record of active participation in oversight of environmental issues, including impacts from oil and gas on air quality, and our contribution to the public’s understanding of these issues, as compared to the level of public understanding prior to disclosure, are well established.

The information requested in this FOIA request will be used to contribute to one or more of the following: petitions, local and national newsletters, public presentations, e-mail and postal mail publications, and local and national news stories contributed to or written by Guardians and our members. The most likely sources of dissemination will be through the print and online media, although it may also be disseminated through other public advocacy channels and associated media work and mailed publications.

Guardians will also disseminate the requested information via a publicly accessible “repository” website where Guardians’ Climate and Energy Program posts FOIA requests and responses from federal agencies. This website can be accessed here, <https://wildearthguardians.org/climate-energy/foia-repository/>. We also regularly inform the public of this website through social media and blog posts.³

1. The use of these records will add new and different information to the public understanding.

To our knowledge, the information requested has not yet been fully analyzed, summarized, and disseminated by any member of the public. Thus, its use will add new and different information to public understanding and will enable the public to gain a more holistic

³ See, e.g., WildEarth Guardians, Amid Government Shutdown, Trump’s Interior Department Rolls Back Transparency, Dec. 27, 2018, <https://wildearthguardians.org/brave-new-wild/climate-energy/amid-government-shutdown-interior-department-proposes-transparency-rollbacks/> (last visited Apr. 19, 2019).

and complete understanding of the EPA's actions regarding the inevitable "bump up" of the Denver Metro-North Front Range ozone nonattainment are from moderate to serious.

2. Whether all or a portion of the broadscale records will be used to enlighten the public.

We do not consider this request to be broadscale, but a specific and focused request for decision records related to a specific and discrete EPA action. All the documents will be used, because all are necessary for gaining a true understanding of the issues.

3. Whether any of the records consist of generic information that lacks substantial informative value.

It is our belief that there is no 'generic' information on this topic, due to the public's limited perception of the subject.

4. Whether any of the requested information is already publicly available either in a duplicative or a substantially identical form, or is readily available from another source.

To the best of our knowledge, very few to none of the documents requested in this FOIA have been released to the public. As we indicated earlier in this request, we do not request any responsive documents that are currently available online on an EPA website that are not subject to alteration, whether temporarily or permanently. If portions of the requested information have been released to the public and are readily available from another source that is not subject to alteration, we request that EPA please inform us of this situation.

Furthermore, simply because some of the requested records may be publicly available in some regard, such as in a remote reading room, does not mean that Guardians does not qualify for a fee waiver. While the public availability of information may be a factor for EPA to consider when assessing whether a fee waiver requestor will contribute significantly to public understanding of the operations or activities of the government, it cannot serve as the sole basis for denying a fee waiver request. *See Campbell v. United States Dep't of Justice*, 164 F.3d 20, 36 (D.C.Cir. 1999) ("[T]he mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further 'public understanding' within the meaning of the fee waiver provisions."). Here, because we intend to obtain, synthesize, and disseminate the requested records to the public via online sources, the media, and other sources, we will be able to reach a broader segment of the American public and proactively educate the public on air quality issues. EPA is not currently undertaking such extensive outreach and proactive education efforts.

II. Obtaining the Information is of No Commercial Interest.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to Guardians' role of educating the general public. Guardians, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

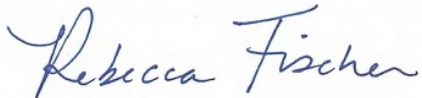
Should you decide not to waive fees, we request that you contact us prior to incurring any costs in excess of \$25. Please feel free to request additional information concerning our fee waiver request if you believe it is needed to make a final decision.

If you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

- 1) Why is each document predecisional?
 - a. To what decision are each of the documents leading?
 - b. Has this decision been finalized?
- 2) Why is each document deliberative?
 - a. To what extent does each make a recommendation on a legal or policy matter?
- 3) What policy recommendation qualifies this document for exemption?

We look forward to your reply within twenty working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions, concerns, or would like to discuss this FOIA request in more detail, please contact me at the information below. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca Fischer". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Rebecca Fischer
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